

The Honorable Ricardo S. Martinez

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CITY OF ISSAQUAH,

Plaintiff,

v.

ORA TALUS 90, LLC, a Delaware limited  
liability company; and RESMARK EQUITY  
PARTNERS, LLC, a Delaware limited liability  
company,

Defendants.

ORA TALUS 90, LLC, a Delaware limited  
liability company; and RESMARK EQUITY  
PARTNERS, LLC, a Delaware limited liability  
company,

Third-Party plaintiffs,

v.

TERRA TALUS LLC, a Washington limited  
liability company; ELEMENT RESIDENTIAL  
INC., a Washington corporation; JOSHUA  
FREED, an individual; J.R. HAYES & SONS,  
INC., a Washington corporation; and TERRA  
ASSOCIATES, INC., a Washington  
corporation,

Third-Party Defendants.

AND RELATED COUNTERCLAIMS

NO. 18-CV-00910 RSM

PLAINTIFF CITY OF ISSAQUAH'S  
ANSWER TO DEFENDANTS ORA  
TALUS 90, LLC AND RESMARK  
EQUITY PARTNERS, LLC'S  
COUNTERCLAIMS

PLAINTIFF CITY OF ISSAQUAH'S ANSWER TO  
DEFENDANTS ORA TALUS 90, LLC AND  
RESMARK EQUITY PARTNERS, LLC'S  
COUNTERCLAIMS – 1

skellengerbender

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1 Plaintiff City of Issaquah, (“The City”), by and through its attorneys of record,  
 2 Skellenger Bender, P.S., hereby answers the counterclaims by Defendants ORA Talus 90,  
 3 LLC and Resmark Equity Partners, LLC (“Defendants”) as follows:

4 **I. FIRST COUNTERCLAIM**  
 5 **(Negligent Damage to Real Property)**

6 39. Paragraph 39 includes legal conclusions to which no response is required. To  
 7 the extent any response may be required, The City denies Paragraph 14.

8 40. The City admits that ORA Talus and Resmark are limited liability companies  
 9 organized under the laws of the State of Delaware. The City is without knowledge or  
 10 information sufficient to form a belief as to the truth of the remaining allegations contained in  
 11 Paragraph 40 and, therefore, denies them.

12 41. The City admits the allegations in Paragraph 41.

13 42. The City admits that this Court has proper jurisdiction over this lawsuit but is  
 14 without knowledge or information sufficient to form a belief as to the truth about whether all  
 15 members of ORA Talus and Resmark are citizens of different states.

16 43. The City admits the allegations in Paragraph 43.

17 44. The City denies the allegations in Paragraph 44.

18 45. The City admits the allegations in Paragraph 45.

19 46. The City admits the allegations in Paragraph 46.

20 47. The City admits that draft and final Environmental Impact Statements and a  
 21 draft Supplemental Environmental Impact Statement were completed in 1998 and 1999 for  
 22 the Talus Master Planned Development. Except as expressly admitted, The City denies the  
 23 remainder of the allegations in Paragraph 47.

24 48. The City admits the allegations in Paragraph 48.

25 49. The City admits that Shangri-La Way was extended above Talus Parcel 9 as a  
 26 Master Developer plat improvement performed on behalf of TMS (Talus Management  
 Services); The City denies that this extension work was a City public works project.

1 Accordingly, and except as expressly admitted, The City denies the remainder of the  
2 allegations in Paragraph 49.

3 50. The City admits that it currently owns a portion of the water system in Talus,  
4 but not the entire system, nor does The City own the system above the Talus 616 reservoir  
5 (Concrete tanks). The City further admits that all infrastructure related to water supply in  
6 Talus was constructed by either TMS or parcel builders. Except as expressly admitted, The  
7 City denies the remainder of the allegations in Paragraph 50.

8 51. The City admits that, on or about September 3, 2015, its staff witnessed Talus  
9 Management Services or parcel builders test water systems as part of the plat improvements  
10 for Talus 9, which have not yet been accepted by the City. Except as expressly admitted, The  
11 City is without knowledge or information sufficient to form a belief as to the truth of the  
12 allegations in Paragraph 51 and, therefore, denies them.

13 52. The City denies the allegations contained in Paragraph 52 as they call for a  
14 legal conclusion to which no response is required.

15 53. The City admits that in September 2015 construction grading and development  
16 began on Talus 9 under the direction of the permit holder, ORA Talus. The City expressly  
17 denies that it placed, or had placed, fills as part of the extension of Shangri-La Way, as there  
18 have been no City-funded infrastructure projects in Talus. Except as expressly admitted and  
19 denied, The City is without knowledge or information sufficient to form a belief as to the truth  
20 of the remaining allegations in Paragraph 53 and, therefore, denies them.

21 54. The City is without knowledge or information sufficient to form a belief as to  
22 the truth of the allegations in Paragraph 54 and, therefore, denies them.

23 55. The City denies the last sentence of Paragraph 55. As to the remaining  
24 allegations in Paragraph 55, The City is without knowledge or information sufficient to form a  
25 belief as to the truth of those allegations and, therefore, denies them.

1           56.     The City admits the allegations in the second sentence of Paragraph 56.  
2 Except as expressly admitted, The City denies the remainder of the allegations in Paragraph  
3 56, as it is without knowledge or information sufficient to form a belief as to the truth of the  
4 remaining allegations.

5           57.     The City admits the allegations in the first sentence of Paragraph 57. The City  
6 denies the allegations in the second sentence of Paragraph 57, as The City is without  
7 knowledge or information sufficient to form a belief as to the truth of the remaining  
8 allegations.

9           58.     The City is without knowledge or information sufficient to form a belief as to  
10 the truth of the allegations in Paragraph 58 and, therefore, denies them.

11           59.     The City is without knowledge or information sufficient to form a belief as to  
12 the truth of the allegations in Paragraph 59 and, therefore, denies them.

13           60.     The City is without knowledge or information sufficient to form a belief as to  
14 the truth of the allegations in Paragraph 60 and, therefore, denies them.

15           61.     The City admits that the landslide occurred on Talus Parcel 9 on or about  
16 November 13, 2015, that cracking was seen in the asphalt curb and gutter, that movement of  
17 retaining walls was observed, and that The City issued a partial stop work order for the Talus  
18 Parcel 9 site on or about November 17, 2015. Except as expressly admitted, The City denies  
19 the remaining allegations in Paragraph 61, as The City is without knowledge or information  
20 sufficient to form a belief as to the truth of the remaining allegations.

21           62.     The City admits the allegations in Paragraph 62.

22           63.     The City denies the allegations in Paragraph 63.

23           64.     The City denies the allegations in Paragraph 64.

24           65.     The City admits that the fill placed on Talus Parcel 9 by J.R. Hayes caused  
25 destabilization of that land. Except as expressly admitted, The City denies the remaining  
26 allegations in Paragraph 65.

1           66.     The City denies the allegations in Paragraph 66.

2           67.     The City denies the allegations in Paragraph 67.

3           68.     The City denies the allegations in Paragraph 68.

4           69.     The City denies the allegations in Paragraph 69.

5           70.     The City denies the allegations in Paragraph 70.

6                                   **II.     SECOND COUNTERCLAIM**  
7   **(Trespass)**

8           71.     The City incorporates by reference all its answers to the preceding paragraphs  
9 as if fully set forth herein.

10          72.     The City denies the allegations in Paragraph 72.

11          73.     The City denies the allegations in Paragraph 73.

12          74.     The City denies the allegations in Paragraph 74.

13          75.     The City denies the allegations in Paragraph 75.

14                                   **III.    THIRD COUNTERCLAIM**  
15   **(Nuisance)**

16          76.     The City incorporates by reference all its answers to the preceding paragraphs  
17 as if fully set forth herein.

18          77.     The City denies the allegations in Paragraph 77.

19          78.     The City denies the allegations in Paragraph 78.

20          79.     The City denies the allegations in Paragraph 79.

21          80.     The City denies the allegations in Paragraph 80.

22                                   **IV.    FOURTH COUNTERCLAIM**  
23 **(Strict Liability: Collection, Concentration, Channeling and Casting of Groundwater)**

24          81.     The City incorporates by reference all its answers to the preceding paragraphs  
25 as if fully set forth herein.

26          82.     The City denies the allegations in Paragraph 82.

          83.     The City denies the allegations in Paragraph 83.

          84.     The City denies the allegations in Paragraph 84.

1 85. The City denies the allegations in Paragraph 85.

2 86. The City denies the allegations in Paragraph 86.

3 87. The City denies the allegations in Paragraph 87.

4 **V. FIFTH COUNTERCLAIM**  
5 **(Strict Liability: Artificial Discharge of Groundwater)**

6 88. The City incorporates by reference all its answers to the preceding paragraphs  
7 as if fully set forth herein.

8 89. The City denies the allegations in Paragraph 89.

9 90. The City denies the allegations in Paragraph 90.

10 91. The City denies the allegations in Paragraph 91.

11 92. The City denies the allegations in Paragraph 92.

12 93. The City denies the allegations in Paragraph 93.

13 94. The City denies the allegations in Paragraph 94.

14 **VI. SIXTH COUNTERCLAIM**  
15 **(Violation of RCW 4.24.630)**

16 95. The City incorporates by reference all its answers to the preceding paragraphs  
17 as if fully set forth herein.

18 96. The City denies the allegations in Paragraph 96.

19 97. The City denies the allegations in Paragraph 97.

20 98. The City denies the allegations in Paragraph 98.

21 99. The City denies the allegations in Paragraph 99.

22 100. The City denies the allegations in Paragraph 100.

23 101. The City denies the allegations in Paragraph 101.

24 102. The City denies the allegations in Paragraph 102.

25 **AFFIRMATIVE DEFENSES**

26 AND BY WAY OF FURTHER ANSWER, THE CITY OF ISSAQUAH, ALLEGES  
THE FOLLOWING AFFIRMATIVE DEFENSES:

1           1. That Defendants' counterclaims fail to state a claim upon which relief may be  
2 granted.

3           2. That any and all damages sustained by Defendants, which are not herein  
4 admitted but are specifically denied, were and are the proximate result of an unavoidable  
5 accident due to unforeseen circumstances over which The City had no control and for which  
6 no claim lies against The City.

7           3. That at all times herein mentioned, any and all damages sustained by the  
8 Defendants, which are not herein admitted but are expressly denied, were and are the  
9 proximate result of the acts, omissions and/or negligence of third persons, which acts  
10 omissions and/or negligence were not reasonably foreseeable by The City and which  
11 intervening acts, omissions and/or negligence bar any and all recovery against The City.

12           4. That at all times herein mentioned, any and all damages sustained by the  
13 Defendants, which are not herein admitted but are expressly denied, shall be apportioned  
14 between all responsible persons or entities whether party defendants or not.

15           5. That Defendants have failed to minimize and mitigate Defendants' injuries and  
16 damages, and such claims are thereby barred.

17           6. That such injuries and damage as Defendants may have sustained were  
18 proximately caused and contributed to by Defendants' own negligence.

19           7. That Defendants voluntarily and knowingly assumed the risk of sustaining the  
20 injuries and damages of which Defendants now complain.

21           8. That Defendants have failed to join necessary and indispensable parties.

22           9. That this Court lacks subject matter jurisdiction.

23           10. That The City is immune from liability.

24           11. That Defendants' claims are barred by applicable statutes of limitation.

25           12. That Defendants' claims are barred by laches.

26           13. That Defendants' claims are barred by estoppel and/or waiver.

14. That all statements, if any, made by The City were privileged and true.

15. That Defendants' counterclaims are barred by the doctrine of unclean hands.

16. The City reserves the right to add additional affirmative defenses and/or party defendants as discovery may warrant.

## PRA YER

THE CITY denies ORA Talus and Resmark are entitled to any of the requested relief.

Dated this 16<sup>th</sup> day of October, 2018.

s/ Terence J. Scanlan

Terence J. Scanlan, WSBA #19498

Patricia A. Robért, WSBA #46716

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COUNTERCLAIMS – 8

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**CERTIFICATE OF SERVICE**

THE UNDERSIGNED swears under penalty of perjury under the laws of the State of Washington as follows:

1. I am over the age of 21, am an employee of Skellenger Bender, P.S., and not a party to this action.

2. On October 16, 2018, I caused a true and correct copy of the foregoing document to be served on counsel of record in the following manner:

**Counsel for Defendants**

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DATED this 16<sup>th</sup> day of October, 2018, at Seattle, Washington.

s/ George L. Auslander  
George L. Auslander, Paralegal